Construction and General Laborers' Local Union No. 190, Albany, New York and Vicinity, AFL–CIO *and* ACMAT Corporation and Sheet Metal Workers International Association, AFL–CIO and Sheet Metal Workers International Local Union No. 83, AFL–CIO. Case 3–CD–601

January 21, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On September 16, 1991, Administrative Law Judge Richard A. Scully issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief, a motion to strike the Respondent's attachment to brief in support of exceptions, and a motion to strike exceptions.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order.

[1] The General Counsel moved to strike the Respondent's exceptions on the grounds that they do not comply with the requirements of the Board's Rules and Regulations. We find that the Respondent's exceptions and brief together sufficiently designate the Respondent's points of disagreement with the judge's decision even though not fully in compliance with the literal requirements of Sec. 102.46. *Cincinnati Bronze*, 286 NLRB 39 fn. 1 (1987). Accordingly, the General Counsel's motion is denied.

The General Counsel also moved to strike the attachment to the Respondent's brief, alleging that it is the same attachment which was appended to the brief to the judge and which the judge rejected. The attachment contains part of Local 190 Official Charles Mirabile's testimony at an earlier 10(k) hearing which the Respondent is attempting to use to contradict the testimony of Robert Fortune. The judge rejected the testimony in question because Mirabile was not called as a witness and the transcript was not offered or received into evidence in this proceeding. We agree with the judge's ruling and grant the General Counsel's motion to strike the attachment.

[2] The Respondent's has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We do not agree with the Respondent that the judge was compelled to draw an adverse inference from the General Counsel's failure to call as witnesses Tony Carapresso, managing director of Eastern Contractors Association, and Bill Sweeney, an employee of Sweet Associates, to corroborate Robert Fortune's testimony. We note, however, that the cases on which the judge relied concerning the drawing of inferences have been superseded by *International Automated Machines*, 285 NLRB 1122 (1987), enfd. mem. 131 LRRM 3264 (6th Cir. 1988). With regard to the particular issue here, in light of the credibility resolutions the judge made with regard to Fortune's testimony and his specific finding that Fresina's testimony regarding the August 4 meeting was in many ways consistent with Fortune's testimony, the judge's finding that an adverse inference was not warranted was a reasonable exercise of his discretion. In any event, the threats made by the Respondent on August 25 and 28, 1989, would support the judge's findings and recommended Order.

[3] The Respondent excepts to the judge's conclusion that it threatened ACMAT and also contends that the complaint is deficient in that it alleges that the Respondent threatened, coerced, and restrained ACMAT. The alleged threats, the Respondent argues, were made to Sweet Associates. Although the complaint may not have been artfully drafted, it was clear throughout the litigation that the Respondent was alleged to have made threats to Sweet Associates with an object of forcing or requiring ACMAT to use employees the Respondent represents instead of employees represented by the Sheet Metal Workers. The purpose of Congress in enacting Sec. 8(b)(4)(D) was to protect *any* employer against which a union acts unlawfully to force reassignment of work. See *Plumbers Local 195 (Gulf Oil)*, 275 NLRB 484, 485 (1985). We find that the Respondent has not been prejudiced by the wording of the complaint, and we shall amend the judge's Conclusions of Law and substitute a new notice to conform to the judge's findings and his recommended Order.

AMENDED CONCLUSIONS OF LAW

Substitute the following for the judge's Conclusion of Law 4.

''4. The Respondent engaged in unfair labor practices in violation of Section 8(b)(4)(ii)(D) of the Act by threatening massive demonstrations and disruptions of work with the object of forcing or requiring ACMAT to assign the work to employees represented by the Respondent rather than to employees represented by the Sheet Metal Workers.''

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Construction and General Laborers' Local Union No. 190, Albany, New York and Vicinity, AFL–CIO, its officers, agents, and representatives, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten to engage in massive demonstrations, labor disruptions, or other proscribed conduct in order to force or require ACMAT Corporation to assign asbestos abatement work on the demolition project at the third floor of the Old State Education

Building in Albany, New York, to employees represented by us rather than to employees who are represented by Sheet Metal Workers International Association, AFL–CIO, and Sheet Metal Workers International Local Union No. 83, AFL–CIO.

CONSTRUCTION AND GENERAL LABORERS' LOCAL UNION NO. 190, ALBANY, NEW YORK AND VICINITY, AFL–CIO

Alfred M. Norek, Esq., for the General Counsel.
Eugene P. Devine, Esq. of Albany, New York, and *Theodore T. Green, Esq.*, of Washington, D.C., for the Respondent.

DECISION

STATEMENT OF THE CASE

RICHARD A. SCULLY, Administrative Law Judge. Upon a charge filed on October 12 and an amended charge filed on October 20, 1989, by ACMAT Corporation, the Regional Director for Region 3, National Labor Relations Board (the Board), issued a complaint on February 8, 1991, alleging that Construction and General Laborers' Local Union No. 190, Albany, New York and Vicinity, AFL–CIO (Laborers' Local 190), committed certain violations of Section 8(b)(4)(i) and (ii)(D) of the National Labor Relations Act, (the Act). The Respondent filed a timely answer denying that it had committed any violation of the Act.

A hearing was held in Albany, New York, on May 28, 1991, at which all parties were given a full opportunity to participate, to examine and cross-examine witnesses, and to present other evidence and argument. Briefs submitted on behalf of the General Counsel and the Respondent have been given due consideration. On the entire record and from my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material, Sweet Associates, Inc. was a New York corporation with an office and place of business in Schenectady, New York, engaged in the business of a general contractor in the building and construction industry. Sweet annually purchases, transfers, and delivers to its New York jobsites goods and materials valued in excess of $50,000 which are transported to said jobsites directly from points located outside the State of New York. At all times material, ACMAT was a Connecticut corporation engaged in the business of asbestos abatement throughout the United States, including Albany, New York. ACMAT annually derives gross revenues in excess of $500,000 and purchases and receives equipment and materials valued in excess of $50,000 from suppliers located outside the State of New York. The Respondent admits, and I find, that Sweet and ACMAT are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Laborers' Local 190 and Sheet Metal Workers International Association, AFL–CIO and Sheet Metal Workers International Local No. 83, AFL–CIO (Sheet Metal Workers), are labor organizations within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

In August l989,[1] Sweet Associates, Inc., a general contractor engaged in building construction and renovation work, was awarded a contract by the State of New York to demolish the third floor of an historic building in Albany, New York, known as the Old State Education Building, in preparation for new installation to come later. The project involved asbestos abatement which Sweet was not able to perform itself and necessitated that it solicit bids from contractors qualified and licensed to perform such work. ACMAT was among the bidders. In late July, after Sweet's president, Robert Fortune, learned that its bid for the project would be accepted, he advised Sam Fresina, business manager of Laborers' Local 190, that there was a possibility that ACMAT would be awarded the subcontract for the asbestos abatement portion of the work. Fresina indicated that the selection of ACMAT would be ''a problem'' and a meeting was arranged for August 4. As a result of certain statements allegedly made by Fresina at that meeting and in subsequent telephone conversations with Fortune, ACMAT filed the charges that are involved here. In the ensuing 10(k) proceeding, after a hearing, the Board issued a decision and determination of dispute in which it held that employees of ACMAT, represented by the Sheet Metal Workers, were entitled to perform the asbestos abatement work in question.[2] When, after the issuance of the Board's determination in the 10(k) proceeding, the Respondent failed to give written notice to the Regional Director that it would refrain from forcing ACMAT, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with that determination, the instant complaint was issued.

B. *The Testimony Concerning the Alleged Threats*

The August 4 meeting between Sweet and Laborers' Local 190 was held at the office of the Eastern Contractors Association. Fortune and Bill Sweeney represented Sweet, Fresina and Charles Mirabile represented the Laborers, and Tony Carapresso, managing director of Eastern, was also present.

Fortune testified that at that meeting he explained why Sweet intended to choose ACMAT instead of the other two contractors still under consideration for the asbestos abatement subcontract. Fresina said that selecting ACMAT would be a problem because it used sheet metal workers. He also said that if ACMAT did not use laborers from Local 190, ''it would result in labor disruptions on the job; it would result in massive demonstrations; the work would not proceed.'' Fortune also testified that he proposed that ACMAT subcontract some of the work to a local contractor or that ACMAT hire some laborers from Local 190 as well as using its own people but that neither proposal was acceptable to Fresina. At the end of the meeting, Fresina said that if ACMAT hired one sheet metal worker or one person from outside Local 190 it would result in massive demonstrations and labor disruptions.

Fortune testified that after the demolition contract was awarded to Sweet he telephoned Fresina on August 25 to tell him that ACMAT was the likely choice for the asbestos re-

[1] Hereinafter, all dates are in 1989 unless otherwise indicated.
[2] 300 NLRB 1117 (1990).

moval work and why he had made that choice. Fresina told him that there would be labor disruptions and that he could not allow Sweet to go ahead and hire ACMAT because of its use of sheet metal workers. Fortune again suggested that ACMAT hire some people from Local 190 and Fresina said that he would be willing to meet with ACMAT, if it was willing, to talk about it. After speaking to ACMAT, Fortune telephoned Fresina on August 28 and told him ACMAT was willing to talk about taking some people from Local 190. Fresina said that he would meet only if ACMAT would take all of the people needed from Local 190 and not have anyone else on the job. Fresina repeated the threat that if there was a contractor who did not use Local 190 laborers there would be labor disruptions and massive demonstrations, that the work would not proceed and that both Sweet and the subcontractor would lose money. On August 29, Fortune telephoned Fresina to tell him the subcontract would be awarded to ACMAT and to set up a prework conference. Sweet began work on the project around the end of August or first of September and finished in August 1990. ACMAT was on the site from late September until the spring of 1990.

Sam Fresina testified that his duties as business manager and principal officer of Local 190 include ''protecting jurisdiction to see to it that our work isn't overlapped by other trades.'' He said that at the meeting on August 4 he told Fortune that he hoped that ACMAT would use laborers as had been done in the past (a reference to a similar project that Sweet and ACMAT had been involved in about 2 years before) and that they were trained and qualified. Fortune said that he did not know what ACMAT was going to do. At the end of the meeting, Fresina told Fortune that if ACMAT did not go with the same agreement they had in the past and were to award their work to sheet metal workers and bring in people from out of town, the laborers that had worked for ACMAT on the previous contract ''would demonstrate against that misassignment of work; demonstrate against ACMAT Corporation for not complying with the agreements.'' Fresina also said that he would get in touch with the commissioner of labor. In subsequent telephone conversations with Fortune, he made similar statements concerning demonstrations. Fresina testified that he had never used the phrase ''massive demonstrations and labor disruptions,'' but said only that ''we would demonstrate.'' He never said where they would demonstrate and did not say they would take any action at the jobsite.

C. *Analysis and Conclusions*

In order to constitute a violation of the Act, the Respondent must have communicated ''a threat of illegal conduct.'' *Longshoremen ILWU Locals 40 & 8 (STC Submarine)*, 299 NLRB 203 fn. 2 (1990). In the present case, it is not Fortune's subjective interpretation of Fresina's remarks that is determinative, ''rather, the critical considerations are the specific language used and surrounding conduct and events.'' *Teamsters Local 82 (Champion Exposition)*, 292 NLRB 794 fn. 6 (1989). The Respondent argues that Fresina said only that there would be ''demonstrations'' which, in and of itself, is too vague or ambiguous to constitute a threat and there was no subsequent action on the Respondent's part which served to resolve the ambiguity. I do not agree.

I find that the credible testimony of Fortune establishes that Fresina told him that if ACMAT were awarded the asbestos abatement work there would be ''massive demonstrations,'' labor disruptions on the job,'' ''the work would not proceed,'' and that both Sweet and ACMAT ''would lose money'' on the project. I find that Fresina's statements were not vague or ambiguous, but clearly constituted a threat of illegal conduct by the Respondent. Any possible ambiguity in the term ''massive demonstrations'' was removed by Fresina's further remarks that there would be labor disruptions which would cause the work not to proceed. Those additional remarks provide the context in which the totality of his statements must be viewed. While it may be true that Fresina did not specifically say the demonstrations would occur at the jobsite, his statements that there would be labor disruptions on the job, that the work would not proceed, and that the contractors would lose money on the project, served to remove any reasonable doubt that he was threatening that the Respondent would engage in proscribed conduct at the jobsite.

I found Fortune to be a credible and impressive witness who was repeating in his testimony Fresina's words and not Fortune's subjective impressions or interpretations of those words. The Respondent's attacks on Fortune's credibility are not persuasive. He spoke in a straightforward and unhesitant manner throughout his testimony. The Respondent has not established any basis for its apparent contention that his testimony in this proceeding is inconsistent with what he said at the 10(k) hearing. Given the excerpts read into the record here, the opposite appears to be true. Likewise, the fact that in his direct testimony Fortune did not refer to certain other statements by Fresina concerning possible actions the Respondent might take, which were not alleged to constitute unlawful threats but which he admits were made, does not, under the circumstances, cast any doubt on his credibility. There is nothing to suggest that Fortune omitted them for any reason other than that he did not consider them pertinent. He freely admitted on cross-examination that Fresina said other things during the course of their conversations.

Fresina's testimony did little to contradict that of Fortune or to cast any doubt on his credibility. He admitted that he spoke about the possibility of ''demonstrations'' in several conversations with Fortune. The only conversation about which he offered any detail was that at the meeting on August 4 in which he said he told Fortune that laborers previously employed by ACMAT would ''demonstrate against that misassignment of work; demonstrate against ACMAT Corporation for not complying with the agreements.'' While he denied that he ever used the specific phrase ''massive demonstrations and labor disruptions,'' his testimony does not contradict that of Fortune that he said that there would be labor disruptions, that the work would not proceed and the contractors would lose money on the project, either on August 4 or in the other conversations Fortune described. The Respondent has attempted to use testimony given at the 10(k) hearing by Charles Mirabile, a Laborers' Local 190 official who attended the meeting on August 4, to contradict that of Fortune by attaching a transcript of that testimony to its brief in this matter. I have given that testimony no consideration inasmuch as Mirabile was not called as a witness by the Respondent and the transcript of his testimony was not offered or received into evidence. In any event, the answer the Respondent seeks to rely on was given in response to a leading question posed by its counsel which was objected to

and indicates only that Mirabile, not Fresina, made no threats of massive demonstrations at that meeting. Finally, I find no basis for drawing an adverse inference, as the Respondent urges, because the General Counsel did not call Sweeney or Carapresso to corroborate Fortune's testimony about the August 4 meeting since these witnesses were equally available to both parties. *Hitchner Mfg. Co.*, 243 NLRB 927 (1979); *Atherton Cadillac*, 225 NLRB 421, 422 fn. 3 (1976).

In summary, I find based on the credited testimony of Fortune that the Respondent acting through Fresina made threats at a meeting on August 4 and in telephone conversations on August 25 and 28 that it would engage in unlawful demonstrations and disruptions of work in order to force ACMAT to assign the asbestos abatement work to be done at the Old State Education Building in Albany, New York, to employees who were members of or represented by the Respondent, in violation of Section 8(b)(4)(ii)(D) of the Act.[3]

CONCLUSIONS OF LAW

1. Sweet and ACMAT are both employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent, Construction and General Laborers' Local Union No. 190, Albany, New York and Vicinity, AFL–CIO, and Sheet Metal Workers International Association, AFL–CIO, and Sheet Metal Workers International Local Union No. 83, AFL–CIO, are labor organizations within the meaning of Section 2(5) of the Act.

3. The disputed work involved is the asbestos abatement portion of the demolition project performed at the third floor of the Old State Education Building in Albany, New York.

4. The Respondent engaged in unfair labor practices in violation of Section 8(b)(4)(ii)(D) of the Act by threatening ACMAT with massive demonstrations and disruptions of work with the object of forcing or requiring said employer to assign the work to employees represented by the Respondent rather than to employees represented by the Sheet Metal Workers.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[3] Counsel for the General Counsel has moved to dismiss the complaint allegation that the Respondent's failure to give written notice of compliance with the Board's determination of dispute, herein, is a separate violation of Section 8(b)(4)(D), on the basis of the Board's decision in *Iron Workers Local 751 (Hoffman Construction)*, 293 NLRB 570 (1989). The motion is granted.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes of the Act.

On the these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Construction and General Laborers' Local Union No. 190, Albany, New York and Vicinity, AFL–CIO, its officers, agents, and representatives, shall

1. Cease and desist from threatening to engage in massive demonstrations, labor disruptions, or other proscribed conduct with the object of forcing or requiring ACMAT Corporation to assign asbestos abatement work on the demolition project at the third floor of the Old State Education Building in Albany, New York, to employees it represents rather than to employees represented by the Sheet Metal Workers.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its business offices and meeting halls in Albany, New York, copies of the attached notice marked ''Appendix.''[5] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Sign and return to the Regional Director sufficient copies of the notice for posting by Sweet and ACMAT, if willing, at all places where notices to employees are customarily posted.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''